

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1299

To be argued by
HENRY H. KORN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1299

UNITED STATES OF AMERICA,

Appellee,

—v.—

ESAU SALONE,

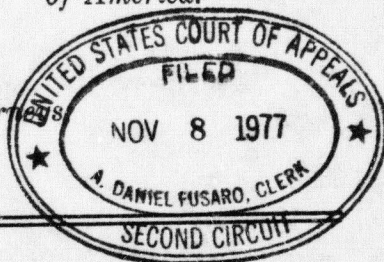
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

HENRY H. KORN,
AUDREY STRAUSS,
*Assistant United States Attorneys
Of Counsel.*



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COUNTY OF NEW YORK) ss.:

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79 MADISON AVE.
NEW YORK, N.Y. 10016*

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1299

UNITED STATES OF AMERICA,

Appellee,

—v.—

ESAU SALONE,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Esau Salone appeals from a judgment of conviction entered on May 27, 1977, in the United States District Court for the Southern District of New York, after a two and one-half day trial before the Honorable Charles H. Tenney, and a jury.

Indictment 77 Cr. 62, filed January 28, 1977, charged Salone in three counts with conspiring with Paul Sullivan, a/k/a "Pablo", to violate the federal narcotics laws and with distributing approximately 67.8 grams of heroin and 141.5 grams of heroin on April 27, 1976 and on June 23, 1976, respectively, in violation of 21 U.S.C. §§ 812, 841 (a) (1), 841 (b) (1) (A), 846 and 18 U.S.C. § 2.*

* Salone was charged in a separate two-count indictment, 76 Cr. 63, with conspiring with Harold Jones to violate the federal

[Footnote continued on following page]

Trial began on April 19, 1977, and ended on April 21, 1977, when the jury found Salone guilty on all counts.

On May 27, 1977, Judge Tenney sentenced Salone to four years' imprisonment on each of Counts One, Two, and Three, to run concurrently, and imposed a three year special parole term to follow expiration of confinement. Salone is presently serving his sentence.

Statement of Facts

The Government's Case

A. Synopsis

The Government proved that Esau Salone and Paul Sullivan * conspired together to violate the federal narcotics laws and that on two occasions, April 27 and June 23, 1976, Salone distributed heroin to Carliese Gordon, a Special Agent of the Drug Enforcement Administration who was acting in an undercover capacity at the time. The Government's case was proved at trial through the testimony of Agent Gordon and Police Officer Knorland Carrol, one of the agents conducting surveillance when the sales occurred.

narcotics laws and with distributing approximately 130.4 grams of heroin on November 30, 1976. That case was assigned to the Honorable Whitman Knapp. However, after Salone was sentenced by Judge Tenney, the Government advised Judge Knapp that it would file an order of *nolle prosequi* as to indictment 76 Cr. 63 with respect to Salone.

* On April 18, 1977, Sullivan pled guilty to Counts One and Two of indictment 77 Cr. 62 and on June 6, 1977, Judge Tenney sentenced Sullivan to a term of three years' imprisonment to be followed by a special parole term of three years. Neither the Government nor the defense called Sullivan to testify at Salone's trial.

At the start of trial, defense counsel informed the court and the Government that it would interpose an entrapment defense in the case. The Government proved, however, that Salone was predisposed and willing to commit the narcotics transactions charged in the indictment. The Government proved this through the introduction of evidence that Salone sold quantities of cocaine on March 2, 1976 and April 9, 1976 and heroin on November 30, 1976 to Agent Gordon. (P. Tr. 3).*

B. Evidence of Narcotics Transactions Occurring Prior to April 27, 1976

The Government proved that Agent Gordon first met Salone in the latter part of February 1976 at Salone's Interchange Cocktail Lounge, 172-04 Linden Boulevard, Queens, New York. (Tr. 6-7, 94, 146).** An informant, whom Gordon knew as Saunders and whom Salone knew as Dietricht, introduced Gordon to Salone in the Lounge. (Tr. 6, 183). At their first meeting Gordon told Salone he was interested in buying one ounce of cocaine. Gordon and Salone discussed the price and quality of cocaine

* "P. Tr." refers to the pages of the transcript containing the proceedings prior to the Government's calling its first witness. These proceedings occurred on April 19, 1977. "Tr." refers to the pages of the trial transcript. "App." refers to Salone's appendix; "GX" refers to Government exhibits and "Br." refers to Salone's brief.

** Gordon and the informant were observed by Police Officer Carrol, who along with other agents conducted surveillance in the area of the Interchange Cocktail Lounge on February 19, 1976. (Tr. 9, 146-48). They were seen leaving Gordon's car and walking in the direction of the Lounge.

The Government proved, through Officer Carrol, that each subsequent meeting between Gordon and Salone was under surveillance. Accordingly, parallel transcript references to the testimony of Officer Carrol appear with the testimony of Agent Gordon in the text of this brief.

which Salone could sell, and Salone said one ounce would cost Gordon \$1500 and the ounce he could get for Gordon could be cut two and one-half times. Gordon told Salone that he would contact him within a few days to tell him if he wanted to buy the ounce. (Tr. 7-8).

In the early evening on March 2, 1976, Gordon and the informant met Salone at the rear of the Lounge. (Tr. 9, 149). There Salone complained to Gordon that his connection had been at the Lounge with the cocaine the night before and left when Gordon did not show up. When Salone asked Gordon if he was prepared to buy an ounce of cocaine, Gordon said he was and gave Salone \$1500 in cash to count. (Tr. 10-11). After counting the money and returning it to Gordon, Salone excused himself to make a phone call, returned to the rear room and told Gordon that his connection would be at the Lounge around 9:30 that night. Instead of waiting, Gordon and the informant left the Lounge, met with surveillance agents and returned to the Lounge at 9:30 P.M. (Tr. 150). Thereafter Salone took Gordon and the informant to the rear room, Salone gave Gordon a package containing the cocaine and Gordon gave him \$1500 in return. (Tr. 11-14). Gordon told Salone that if the cocaine was satisfactory, he would be interested in buying drugs from Salone on a regular basis. (Tr. 20).

After Gordon and the informant left the Lounge, they met with Officer Carrol and Gordon showed Carrol the package of cocaine which Salone had given him. (Tr. 14, 151). In the meantime the informant was searched, as he had been before Gordon and he first went into the Lounge that night, and neither drugs nor weapons were found on him. (Tr. 10, 14, 15).*

* The court instructed the jury as to the significance of this March 2nd transaction. The jury was told that if it believed there was proof beyond a reasonable doubt that Salone made the sales on April 27 and/or June 23, 1976, it was entitled to consider the

[Footnote continued on following page]

After Gordon bought the ounce of cocaine from Salone on March 2, he met Salone at the Lounge on the evening of March 23, 1976. This time the informant was not with Gordon. (Tr. 21, 152-53). Gordon told Salone that the cocaine he had bought was satisfactory and they discussed the availability of three ounces of cocaine, price and quality. Salone told Gordon that three ounces would cost \$4,300 and that the quality would be better than the cocaine Gordon had bought from him before. Gordon told Salone he would let him know if he wanted to buy the cocaine. (Tr. 22).

On the evening of March 30, 1976, Gordon went to the Lounge and met with Salone to purchase three ounces of cocaine. After waiting for Salone's connection who did not arrive, Gordon left and told Salone he would call him in a few days concerning the purchase of the cocaine. (Tr. 24-26).

After Gordon was unable to obtain the three ounces of cocaine on March 30, he telephoned Salone on April 9 and asked Salone when the deal would go through. Salone told him to come to the Lounge that night. (Tr. 26, 33, 153). Gordon met Salone in the Lounge. While they waited for Salone's connection who was coming from Brooklyn, Salone introduced Gordon to his twin brother, Jacob, who had been an inmate in state prison. Salone told Gordon that on occasion when he visited Jacob in prison, he delivered between one-half and one ounce of cocaine to Jacob. (Tr. 27, 30). After Salone's connection arrived with the cocaine, Salone took Gordon to the rear room of the Lounge and gave Gordon the package containing three ounces of cocaine. In return Gordon gave Salone \$4,300.*

evidence of the March 2 transaction as bearing upon Salone's state of mind, intent and propensity to commit the narcotics transactions charged in the indictment. (Tr. 17-19).

* Gordon showed the package of cocaine which Salone sold to him to Officer Carrol. (Tr. 155).

C. The April 27, 1976 Sale of Heroin

After Gordon purchased the three ounces of cocaine,* he asked Salone if Salone knew any connections for heroin. Salone said he had a connection, the heroin would cost \$1,200 an ounce and the quality of the heroin was such that it could be cut seven times. Gordon said he would contact Salone and tell him how much heroin he wanted to buy. (Tr. 34-35).

Thereafter, on April 26, 1976, Gordon called Salone and said he wanted to buy two ounces of heroin. Salone said the cost would be \$2,600 and told Gordon to meet at the Lounge the following day, so that they could drive into the City to get the heroin. (Tr. 35-36).

In the early afternoon on April 27, 1976, Gordon met Salone at the Lounge and from there they drove into Manhattan. In the vicinity of 116th Street and 5th Avenue, Salone met with Paul Sullivan and obtained the package containing two ounces of heroin. After receiving the package from Sullivan, Salone gave the package to Gordon and Gordon paid Salone \$2,600. (Tr. 37-43). After the sale Gordon and Salone returned to the Lounge and Gordon said if the heroin was of good quality, he would contact Salone in a few days. (Tr. 44, 157-59).

On the basis of laboratory tests, Gordon learned that contrary to what Salone had said, the heroin could not be cut seven times. Consequently, on June 1, 1976, Gordon met Salone at the Lounge, (Tr. 164), and told Salone he was not satisfied with the quality of the heroin Salone had sold him. Gordon told Salone to contact his source and get a sample of better quality heroin. Salone agreed

* Preceding the Government's offer of the three ounces of cocaine, the court repeated its limiting instructions and reminded the jury of the significance of the transactions which occurred prior to the April 27, 1976 charge in the indictment. (Tr. 31-33).

to do this and said he would have the sample for him the next day. During their meeting, Salone told Gordon that it would be more expensive if he bought better quality heroin. They also discussed the sale of approximately five ounces of heroin. (Tr. 46, 48-50).

Gordon returned to the Lounge on June 2, 1976 (Tr. 165); Salone gave him the heroin sample and said it could be cut seven times. (Tr. 50). Gordon said that he would contact Salone in the near future. (Tr. 53).*

D. Negotiations for the Purchase of 1/8 Kilogram—the June 16, 1976 Telephone Conversation

On June 16, 1976, Gordon telephoned Salone to determine what Salone would charge him for one-eighth kilogram of heroin. The telephone conversation was recorded. (GX 6, 7). Gordon said he was interested in getting the most heroin for the lowest cost. Salone let Gordon understand that if he bought 1/8 kilogram, it would cost \$6,000. Salone told Gordon that four ounces would also cost \$1,500 per ounce, but that Gordon would get almost five ounces in the 1/8 kilogram and not have to pay \$7,500, the cost of five ounces alone. Salone invited Gordon to his Lounge the following night, and said he was having a party at the Lounge that night, but could quickly make the transaction with Gordon. Gordon agreed to buy 1/8 kilogram. (Tr. 53-56, 203-05). Gordon did not go to the Lounge on June 17. On that day he called Salone, said he was having difficulty raising the money to buy the heroin and that the sale would have to be postponed several days. (Tr. 60).

E. Salone Sells Gordon Heroin on June 23, 1976

On June 22, 1976, Gordon called Salone and said he had the money and was ready to buy the 1/8 kilogram of heroin. Salone told Gordon to call him the following day to finalize arrangements for the sale. (Tr. 60). On the

* Gordon showed the package of heroin which he received from Salone to Officer Carrol. (Tr. 165).

evening of June 23, Gordon met Salone at the Lounge and from there they drove to 116th and 117th Streets and 5th Avenue in Manhattan.* At the Rainbow Inn, Salone introduced Gordon to Sullivan. This was the first time they had ever met. Salone said that they would have to drive to the Bronx to get the heroin. (Tr. 61-64). Sullivan, Salone and Gordon drove together to Taylor and Westchester Avenues in the Bronx. There, Sullivan left Gordon and Salone and a few minutes later returned with the package. Sullivan gave the package of heroin to Salone and he turned it over to Gordon. Gordon gave \$6,000 to Sullivan. Sullivan then left the car and a short time later returned and told Gordon to drive back to 116th Street and 5th Avenue. (Tr. 66).

On returning to 116th Street and 5th Avenue, Sullivan and Salone left Gordon and entered the R&B Delicatessen.** Moments later, Salone returned to Gordon and said it would not be necessary for Gordon to drive him back to Queens, because he was waiting for someone to bring him cocaine and Sullivan would drive him to Queens. (Tr. 67-68, 1966-67).***

F. Evidence of Narcotics Transactions Occurring after June 23, 1976

Gordon and Salone maintained contact with each other during the summer and fall of 1976. During this time, Gordon was in California on another assignment. (Tr. 69-71).

* Enroute to Manhattan, Salone told Gordon that when he was a motorman with the Transit Authority, on occasion he would deliver narcotics to various people at pre-arranged locations in the subway. (Tr. 62).

** The R & B Delicatessen was owned by Sullivan at the time. (Tr. 43).

*** Except for their presence in the Bronx on June 23, Gordon, Salone and Sullivan were observed together in Manhattan by surveillance agents. (Tr. 166-167).

Upon returning to New York in mid-November 1976, Gordon called Salone to arrange a purchase of one-quarter kilogram of heroin. Salone told Gordon the cost would be twice the cost of one-eighth kilogram. (Tr. 71-72). Plans were finalized for Gordon to meet Salone on November 30, 1976 at the Lounge to purchase the 1/4 kilogram. (Tr. 72).

Around noon on November 30, Gordon met Salone at the Lounge and Salone said that instead of going to the connection on 116th Street and 5th Avenue, the sale would be made at 87th Street and Amsterdam Avenue. (Tr. 74). Enroute to Manhattan, Salone told Gordon that his connection only had 1/8 kilogram of heroin to sell, but that he was expecting an additional 1/8 kilogram later in the day and would sell it to Gordon. Gordon said he did not want to wait for the second package and would not agree to buying the quarter in two separate deals. (Tr. 75). At 87th Street and Park Avenue, Gordon stopped the car and gave Salone \$13,000 to count. After Salone returned the money to Gordon, Gordon said he would place the money in the trunk and when the package was delivered, tested and weighed, he would make the payment. (Tr. 75-76).*

Gordon placed the money in the trunk and he and Salone drove west to 87th Street and Amsterdam Avenue. There, Harold Jones joined Gordon and Salone in the car and Jones gave Gordon a sample and later a package containing 1/8 kilogram of heroin. After he received the package, Gordon walked to the trunk and gave the

* Unknown to Salone, Gordon had advised surveillance agents that his opening the car trunk would be the arrest signal. (Tr. 76, 171).

signal to surveillance agents to arrest Salone and Jones. (Tr. 77-79, 168-71).*

The Defense Case

Salone testified and exhibited a remarkably selective memory. He said that as a result of Gordon's repeated requests for him to obtain narcotics for Gordon, Salone arranged the transactions of April 27, June 23 and November 30, 1976. Salone contended that he was entrapped by Agent Gordon.

Salone described the circumstances of his first meeting Gordon. In the latter part of January 1976, a customer, whom he knew as Dietricht, introduced Gordon to him. Contrary to Gordon's testimony, however, Salone denied that at this first meeting they had a discussion regarding narcotics. Instead, Salone claimed that Gordon came to the bar four or five times as a customer and then asked Salone if he could obtain drugs. In spite of his telling Gordon narcotics were not his business, Gordon came to the bar several more times, each time asking Salone if he could get drugs. (Tr. 184-85).

Salone denied selling Gordon the one ounce of cocaine on March 2, 1976 and denied selling Gordon the three ounces of cocaine on April 9, 1976. (Tr. 186).** Salone did admit that he arranged to obtain heroin for Gordon on April 27, 1976 and was present when Gordon received

* Preceding the Government's offer of the 1/8 kilogram of heroin which Gordon bought on November 30, the court repeated its limiting instructions and reminded the jury of the significance of the transaction which occurred after the June 23, 1976 charge in the indictment. (Tr. 81).

** Of course, Salone's testimony conflicted with Officer Carroll's having seen the packages of cocaine on March 2 and again on April 9, 1976 (Tr. 151, 155), and the sample of heroin on June 2, 1976. (Tr. 165).

the drugs; however, he claims he did this at Gordon's request. (Tr. 186-87). Contrary to Gordon's testimony, Salone denied receiving any money from Gordon for the sale of heroin on April 27, 1976. (Tr. 187, *but see* Tr. 41).

Salone recalled that after the sale of heroin on April 27, Gordon complained that the quality of the heroin was unsatisfactory and Salone told Sullivan about Gordon's complaint. (Tr. 202). However, Salone denied giving Gordon a free sample on June 2, 1976. (Tr. 188, *but see* Tr. 50).^{*} Salone also admitted that it was his voice on the tape of the June 16 telephone conversation with Gordon. (Tr. 203). He knew that their conversation concerned price and weight in connection with a future heroin sale. His version of the conversation was that his connection, Sullivan, had given him the information to give to Gordon. (Tr. 204).

Salone admitted that he arranged the sale of heroin to Gordon on June 23, 1976 and was present when Gordon received the drugs; again his claim was that he did this at Gordon's request. (Tr. 188-89). Salone denied giving Gordon the heroin, denied seeing Gordon give any money to Sullivan in connection with the sale of heroin on that day. (Tr. 188-89, *but see* Tr. 66-67). In fact, Salone said that it was because he was angry with Gordon for not giving him any money for arranging the sales as Gordon had promised, that he did not return to Queens with Gordon after the sale occurred. (Tr. 218, *but see* Tr. 67-68).

Salone also admitted that he arranged the sale of heroin to Gordon on November 30, 1976 and was present when Gordon received the drugs; again his claim was that he did this at Gordon's request. (Tr. 190). Salone explained how he met Harold Jones, the supplier of the heroin. At first he said he learned about Jones from a customer of the Lounge (Tr. 209) and later he changed his story and said he had met Jones at the Lounge. (Tr.

^{*} See footnote **, p. 10.

211). Salone admitted seeing Jones give Gordon the sample, but claims he did not see Jones hand Gordon the package containing the 1/8 kilogram of heroin (Tr. 214, 216), despite the fact that he was in the car with Gordon and Jones when both the sample and package were given to Gordon. He claims he received no money for arranging the sale. (Tr. 217).*

Salone sought to justify his role in the drug transactions. In his own words:

"I knew it was wrong, yes, but I only thought to myself, even if we were apprehended, I wouldn't have anything. I was just sitting here. I neither sold any or handled any. This is the way I thought, and he promised to give me something." (Tr. 220-21).

ARGUMENT

POINT I

The Trial Judge Properly Admitted Evidence of Prior and Subsequent Drug Sales by Salone as Proof of Predisposition.

At the start of the trial, defense counsel told the court and the Government that Salone would claim he was entrapped by Agent Gordon into selling the drugs on April 27 and June 23, 1976. The court thereafter allowed the Government to introduce evidence, in its direct case, of drug sales by Salone to Gordon occurring before April

* Salone also denied giving drugs to his brother during visits to him in prison (Tr. 191) and giving drugs to people at pre-arranged subway stops while he was employed as a motorman for the New York City Transit Authority (Tr. 191).

27 and after June 23, 1976. Salone argues in Points I and VI of his brief that the trial judge erred in admitting this evidence in the Government's direct case. Specifically, he casts his argument as though the District Court erroneously permitted proof of similar acts. This approach attempts to sidestep the plain fact that proof of narcotics transactions not charged in the indictment was admissible to meet Salone's entrapment defense.

Where an entrapment defense has been raised, the Government must prove beyond a reasonable doubt that the defendant had the propensity to commit the crime charged. *United States v. Martinez-Carcano*, 557 F.2d 966, 970 (2d Cir. 1977); *United States v. Steinberg*, 551 F.2d 510, 514 (2d Cir. 1977). It is well settled in this Circuit that proof of propensity and willingness to commit the crime may be shown by evidence of similar acts or related transactions.* *United States v. Apuzzo*, 555 F.2d 306, 307 (2d Cir. 1977); *United States v. Anglada*, 524 F.2d 296, 299 (2d Cir. 1975); *United States v. Warren*, 453 F.2d 738, 745 (2d Cir. 1971), *cert. denied*, 406 U.S. 944 (1972); *United States v. Koska*, 443 F.2d 1167, 1169

* Of course, apart from the admissibility of similar acts to prove propensity, the law in this Circuit continues to be that proof of other crimes is admissible, if relevant, except when offered solely to prove criminal character or disposition. *United States v. Chestnut*, 533 F.2d 40, 49 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976); *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976); *United States v. Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Natale*, 526 F.2d 1160, 1173-74 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Papadakis*, 510 F.2d 287, 295-6 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Gerry*, 515 F.2d 130, 140-41 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Williams*, 470 F.2d 915, 917 (2d Cir. 1972); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967). Among the purposes for which prior and subsequent similar acts are admissible are proof of knowledge, intent, identity and plan or design. *United States v. Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973); *United States v. Johnson*, 382 F.2d 280, 281 (2d Cir. 1970).

(2d Cir.), *cert. denied*, 404 U.S. 852 (1971); *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971). As this Court stated in *United States v. Viviano*, *supra*,

Once the defendant demonstrates inducement, the Government may prove propensity by showing (1) *an existing course of criminal conduct similar to the crime for which the defendant is charged*, (2) *an already formed design on the part of the accused to commit the crime for which he is charged*, or (3) *a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement*. 437 F.2d at 299. (Emphasis added).

In this case, the critical issue at trial became whether Salone had the propensity to engage in the sales on April 27 and June 23, 1977 and was ready and willing to commit the crimes charged. *United States v. Martinez-Carcano*, 557 F.2d 966, 970 (2d Cir. 1977). The trial judge correctly ruled that evidence that Salone was engaged in prior and subsequent drug sales with Agent Gordon was relevant to show Salone's intent "and to negate . . . the defense of entrapment." (P. Tr. 3).

Salone also argues that despite the reference in his counsel's opening statement to the fact that the defense in the case was entrapment, the entrapment defense was not in issue, since Salone had neither testified nor offered any evidence to show Government inducement. (Br. 6-7). For that reason, he argues it was error to permit the Government to meet the entrapment defense on its direct case. This contention overlooks the fact that a defendant can put evidence of inducement before the jury during the Government's direct case through the cross-examination of the Government witnesses. *United States v. Steinberg*, 551 F.2d 510 (2d Cir. 1977) (defendants did not testify, but sought to prove entrapment through cross-examination of Government agents). Accordingly, the Government is

entitled to meet the defense in its direct case, especially where as here the defendant had asserted before trial and in his opening statement that he would interpose the entrapment defense.

POINT II

The Government Was Not Required to Call the Informant to Show that Salone Was Predisposed to Commit the Crimes Charged.

Salone claims that the Government was required to call the informant at trial to prove Salone's disposition to commit the crimes charged. This claim is without merit.

This court recently reiterated in *United States v. Fuentes*, Dkt. No. 77-1083, slip op. 5883 (2d Cir. September 14, 1977) that unless the defense demonstrates to the trial judge that the informant is crucial to his entrapment defense, the court will not reverse a conviction where the Government did not call the informant as a witness. Slip Op. at 5896.

In the present case, Salone was given the name of the informant early in the trial. (Tr. 6-7). However, the defense made no attempt to call him. Nor did it at any time ask the Government where the informant was or ask the Government to make the informant available for an interview.* What is apparent is that there is nothing in

* Since Salone knew the informant's identity, he had an affirmative obligation to attempt to subpoena or otherwise to locate the informant. *United States v. Turbide*, 558 F.2d 1053, 1060 n. 6 (2d Cir. 1977). Absent a showing that such an effort was made, the District Court need not require the Government to produce the informant. See, e.g., *United States v. DeAngelis*, 490 F.2d 1004, 1010 (2d Cir.), cert. denied, 416 U.S. 956 (1974); *United States v. Hodges*, 493 F.2d 11, 12 (5th Cir. 1974); *United States v. Casiano*, 440 F.2d 1203, 1205 (2d Cir.), cert. denied, 404 U.S. 836 (1971).

the record, and in fact Salone made no claim whatsoever before or during trial, that the informant was essential to Salone's entrapment defense.*

POINT III

The Trial Judge Correctly Charged the Jury as to the Interest of a Defendant Who Testifies.

Salone claims that the trial judge erred in charging the jury that in evaluating Salone's credibility, it was entitled to take into consideration his interest in the

* Salone's claim, which was not raised at trial, that the Government was required to call the informant—despite the fact he never even asked to speak to the informant—is transparent. The observations of this Court in *United States v. Comulada*, 340 F.2d 449, 453 (2d Cir.), *cert. denied*, 380 U.S. 978 (1965) are just as relevant to Salone's claim:

We note that in case after case in appeals from convictions for trafficking in narcotics, we hear arguments regarding the government's failure to call the informer or special employee. . . . It seems to be defense strategy to bring out facts from which it can be argued that the government or the court should have called the informer as a witness. Almost never is there a genuine effort to find the witness or to call him even when it is certain that he is available and subject to process We think that this is another such case. (citations omitted).

Salone's reliance on the dissent in *United States v. Townsend*, 555 F.2d 152, 165 (7th Cir. 1977), and *United States v. Tate*, 554 F.2d 1341 (5th Cir. 1977), as supporting the proposition that when the defense argues entrapment, as a matter of law the Government is required to call the informant to show the defendant's propensity to commit the crime, is misplaced. In *Tate*, the court not only did not consider the issue whether the Government was required to call the informant, but in fact concluded that there is no requirement that "the informer be produced at the particular time in the trial that defendant chooses." 554 F.2d at 1343. In *Townsend*, the court held that the Government was not required to prove the defendant's predisposition by the informer's testimony. The dissent's statement to the contrary is not the law in the Seventh Circuit and clearly is not the law in this Circuit. See *United States v. Fuentes*, *supra*, and *United States v. Comulada*, *supra*.

outcome of the case.* He claims the charge was especially prejudicial because the Government was permitted to bolster Agent Gordon's credibility on redirect through his testimony as to his military and government service record. (See Tr. 139).**

This claim is made in the face of well established law in this Circuit that a charge on the defendant's self-interest in testifying is entirely proper. This Court has specifically approved the charge given by the trial court in this case. *United States v. Tolkow*, 532 F.2d 853, 859 (2d Cir. 1976); *United States v. Sullivan*, 329 F.2d 755, 756-57 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1954).

POINT IV

The Trial Judge Correctly Charged the Jury on the Issue of Entrapment.

Salone claims that the court's charge on the issue of entrapment was erroneous. Specifically, he states that the charge allowed the jury to consider the question of inducement, when, he claims, that question was required to have been considered by the court. There can be no doubt but that the District Court gave a proper charge on the issue of entrapment in this case.

Judge Tenney's charge to the jury was:

If you find any credible evidence creating the reasonable possibility that a Government agent or employee instigated or incited or otherwise induced

* This part of the Court's charge appears at page 282 of the trial transcript.

** The trial judge correctly permitted testimony, concerning the seven awards and commendations Gordon received, because of the charges made against Gordon of entrapment. (Tr. 139). See Rule 608 of the Federal Rules of Evidence.

the defendant to commit the crimes charged, then the Government must prove beyond a reasonable doubt that such inducement was not the cause or creator of the crime, that is, that the defendant was predisposed and willing to commit the crimes. (Tr. 277)

This charge on entrapment is virtually identical to the charge approved by this Court in *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).^{*} This Court has recently reaffirmed the use of the *Rosner* charge. *United States v. Martinez-Carcano*, 557 F.2d 966, 969 (2d Cir. 1977). Further, the general elements of Judge Tenney's instructions relating to inducement and predisposition have been specifically approved by this Court on numerous occasions. *United States v. Braver*, 450 F.2d 799, 805 (2d Cir.), *cert. denied*, 405 U.S. 1064 (1971); *United States v. Berger*, 433 F.2d 680, 684 (2d Cir.), *cert. denied*, 401 U.S. 962 (1970). Therefore, the court's charge as to entrapment was entirely proper.

^{*} The charge in *Rosner* provided in pertinent part as follows: If you find no evidence that Leuci directly or indirectly induced the defendant to violate the law, there can be no entrapment. If you find that there is some evidence to commit the crimes charged, the Government must prove beyond a reasonable doubt that the inducement was not the cause of the crimes, that is, that the defendant was ready and willing to commit the offenses. *United States v. Martinez-Carcano*, 557 F.2d 966, 970 n.7 (2d Cir. 1977) (citing *United States v. Rosner*).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

HENRY H. KORN,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

